UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NABET-CWA, Local 51,

and **Case Nos.** 19-CB-244528
19-CB-247119

Jeremy Brown.

BRIEF IN SUPPORT OF CHARGING PARTY'S EXCEPTIONS TO ALJ DECISION

INTRODUCTION

These exceptions primarily concern whether NABET-CWA, Local 51 ("Union") violated the Act when it sent Charging Party Jeremy Brown two threatening "evidence preservation letters" in response to his mere filing of a ULP charge.[1] The ALJ ruled the evidence preservation letters were: (1) not overbroad (ALJD 10-11); and (2) did not unlawfully threaten damages for non-compliance (ALJD 11-12). Additionally, the ALJ found the Brown's argument that evidence preservation letters should be *per se* unlawful was not within the General Counsel's theory of the case (ALJD 12). The Board should reverse the ALJ's decision either for the reasons asserted by the General

[1] In both its Answer and Amended Answer, the Union and its counsel use unprofessional pejoratives to describe the non-party employer of Brown's counsel, the National Right to Work Legal Defense Foundation. *See* GC Ex. 1(l) (Eleventh & Twelfth Affirmative defenses and concluding paragraph). One of the Union's counsel, David Rosenfeld, has been publicly admonished by the Board for similar unprofessional behavior. *UFCW*, 16-CB-003850 (Feb. 17, 1998). More recently, Mr. Rosenfeld has repeatedly asked the Board to lift its admonition, and the Board has declined to do so while reminding Mr. Rosenfeld to abide by the rules of professional conduct. (Board orders dated May 16, 2012; Feb. 10, 2015; Sept. 9, 2019; and July 24, 2020). Despite these repeated orders, the Union's counsel filed an Answer containing the same pejorative and unprofessional statements. This unrepentant and unprofessional conduct demands the Board's disciplinary response, which would likely give rise to sanctions if committed in a federal court. *Inter alia*, the Union's counsel should be suspended from Board practice. *See, e.g.*, NLRB Rules & Regs. §102.177(d) et seq.; *Roemer Industries*, 367 NLRB No. 133, n. 2 (May 23, 2019); *Matter of an Attorney*, 307 NLRB 913 (1992).

Counsel, or hold that such letters in response to the mere filing of a ULP charge are *per se* unlawful. Here, the Union's two "evidence preservation" letters directly threatened Brown and were clearly intended as an intimidation tactic to retaliate and instill fear in him for engaging in the protected Section 7 activity of simply filing a ULP charge.

FACTS

A. The Union ignores Brown's objection letters.

Brown has been employed by American Broadcast Corporation ("ABC") as a "daily hire" since August 2016. He is hired periodically to work as a cameraman for sporting events broadcast primarily on ESPN (Tr. 21-22). These sporting events occur all across the country. In this position Brown is represented by the Union. The Union negotiates a master agreement with ABC covering all daily hire work nationwide. Under this agreement, employees are required to pay dues and fees as a condition of employment after they work more than 20 days in a calendar year or 30 days in two consecutive calendar years (Jt. Ex. 1 p. 21-22).[2]

At the time his employment began in 2016, the Union never informed Brown he was required to pay dues and fees. (Tr. 22-23). Brown thereafter worked numerous events in 2016, 2017, and 2018. Never once during that period did the Union inform Brown that he was required to pay dues and fees as a condition of employment.

Out of the blue, on February 7, 2019, the Union sent Brown a letter stating: "we have been advised that you have been hired as a Daily Hire at ABC, Inc." (Tr. 22-23; GC Ex. 2). The letter adds that employees covered by the Union's CBA are required to pay dues and fees as a condition

[2] The record reflects that prior to 2016 Brown worked sporadically as daily hire for ABC. For example, in 2008, the Union sent Brown a letter informing him of the union security agreement. (Union Ex. 1). However, Union President Carrie Biggs-Adams admitted the Union's records reflected Brown did not work the requisite days necessary to be required to pay dues and fees under the collective bargaining agreement until 2016. (Tr. 82).

of employment. The letter stated that initiation fees are equivalent to three weeks base pay and uniform dues are 2.25% of an employee's total earnings. The letter included a checkoff authorization form that stated Brown's initiation fee was $6,456.00 and authorized the deduction of dues in the amount equal to 1.87% of his pay for the union's dues and fees.

On March 14, Brown received a letter from Union stating that it had sent an incorrect checkoff authorization card that used the wrong dues percentage. (GC Ex. 3). The corrected checkoff authorization card authorized the deduction of dues in amount equal to 2.25% of Brown's pay.

On April 1, Brown received another letter from the Union. For the first time it alerted Brown that he was potentially in arrears to the Union. The letter demanded Brown pay an initiation fee of $6,456.00 and an arrearage of past dues of $3,429.60. (GC Ex. 4). The Union gave Brown two choices: "Pay the back agency fees and initiation fee which total $9,885 in one lump sum, or (2) pay your past due agency fees of $3,429.60 for the period described above a sign the enclosed withholding form that would authorize your initiation fee of $6,456.00 to be deducted at eight percent (8%) and future agency fees to be withheld from future paychecks." The Union demanded that payment or a signed authorization card must be delivered to it by April 17. If Brown did not pay or sign the authorization card by that date, he would be terminated from his employment at ABC.

Obviously concerned that his job was at stake, Brown sprang into action. First, he called the NABET Local 51's office in San Francisco and spoke with its office manager, DeeDee Moura. (Tr. 27-30). As part of the conversation he inquired as to why he was suddenly being charged a significant amount of dues after being on the job for nearly four years, and he sought clarification about the amount owed. (Tr. 28-29). At the end of the conversation, Ms. Moura gave Brown the email address of the Local's president, Ms. Carrie Biggs-Adams. (Tr. 29).

On April 4, 2019, Brown emailed Ms. Biggs-Adams, objecting to becoming a Union member and exercising his *Beck* rights to only pay the Union's costs of collective bargaining. (GC Ex. 5). Brown additionally requested the Union provide him with a reduction of his fees to only the lawfully chargeable costs, and notice of the calculation of that amount verified by an independent certified public accountant. (GC Ex. 5). On April 5, Brown sent an additional email stating he signed the dues deduction and authorization card under protest so as to avoid losing his job. (GC Ex. 6). Shortly thereafter, ABC began deducting dues and fees from Brown's paycheck.

On April 5, Ms. Biggs-Adams emailed Brown and said she would be in touch regarding a response. (GC Ex. 7). However, that response never came. Understandably concerned by the Union's threats and the unresolved issues, Brown followed up on June 4 with another email to Ms. Biggs-Adams reiterating his objections to paying full dues under *Beck* and stating that he wished for a reduction in fees to cover only chargeable activities. (GC Ex. 12). Ms. Biggs-Adams admitted she received this email, (Tr. 89), though she never responded. When Brown did not receive a response to his June 4 objection letter, he filed a ULP charge against the Union.

B. The Union sends two evidence preservation letters.

In direct response to Brown's ULP charge in Case No. 19-CB-244528, the Union's attorney, David Rosenfeld, sent Brown (through his attorney) a lengthy, verbose and threatening letter directing him to "preserve evidence." (GC Ex. 13). This overbroad and threatening letter directs Brown to preserve numerous examples of electronic and paper records relating to all of the allegations in the charge, as well as any documents that may relate to unknown defenses the Union might assert. (GC Ex. 13). The letter also directs Brown to contact any "current or former agent, attorney, employee, custodian, or contractor in possession of potentially relevant [electronically stored information] to preserve such [information]." It also states that should Brown fail to comply,

the Union will "not hesitate to seek damages, sanctions and other remedies under the law." Understandably feeling threatened and concerned by this harassing letter, Brown immediately filed a second ULP charge to challenge the legality of the letter. That ULP charge, Case No. 19-CB-247119, prompted Mr. Rosenfeld and the Union to send Brown (again through Brown's attorney) a second "evidence preservation" letter that was substantively identical to the first. (GC Ex. 14).

EXCEPTIONS

The Union's threatening "evidence preservation" letters violated the Act.

A. The Board should hold evidence preservation letters that are simply in response to a charge *per se* illegal (Exception 1, 12).

NLRA Sections 7 and 8 proscribe any action that "has a reasonable tendency" to coerce or restrain employees in the exercise of their rights under the Act. *Helton v. NLRB*, 656 F.2d 883, 889 (D.C. Cir. 1981). A union or employer may also not restrain or coerce an employee's right to file charges with the Board. *Graphic Arts International Union 96B (Williams Printing Co.)*, 235 NLRB 1153 (1978). The Board jealously protects these rights because the Act's policy is meant to keep "people completely free from coercion against making complaints to the Board." *IBT, Local 391*, 357 NLRB 2330 (2012).

The test used to determine whether a threat is coercive is whether any reasonable employee would be threatened by the communication. *Tamosiunas v. NLRB***,** 892 F.3d 422, 429 (D.C. Cir. 2018) ("if any reasonable employee could view the communication as coercive or restraining, the union (or employer) has violated the law."). Under Board precedent, a union's communication will be restraining or coercive if "the words could reasonably be construed as coercive," even if that is not the "only reasonable construction." *SEIU, Local 121RN*, 355 NLRB 234, 235 (2010). Of course, "heavy-handed threats and sanctions will . . . rise to the level of coercing or restraining the exercise of Section 7 rights and so will readily qualify as unfair labor practices prohibited by

Section 8 of the National Labor Relations Act." *Tamosiunas*, 892 F.3d at 429.

The use of "evidence preservation" letters is uncommon in Board practice, if not virtually unknown. There is no provision in the Board's Rules & Regulations authorizing them, or even discussing their use. To counsel's knowledge the Board has never ruled on the use of an evidence preservation letter in response to the mere filing of a ULP charge, or in any other context. This dearth of authority is a function of the fact such letters are not generally used in Board litigation—except by rogue counsel who are intent on harassing and trying to scare individual employee-charging parties.

Here, the Union's two demand letters are intended as an intimidation tactic to retaliate and hound Brown for engaging in protected Section 7 activity and filing a ULP charge to protect his rights. The Union threatens sanctions and monetary damages for non-compliance. (GC Ex. 13, 14) ("we will not hesitate to seek damages, sanctions, and other remedies under the law."). Similarly, it requests Brown preserve irrelevant data including "PowerPoint" presentations, "Network access and server log activity," "word processing documents," and other forms of electronically stored information. Moreover, the letters' timing is proof that they were retaliatory responses to the filing of the charges themselves, rather than a good faith tactic used to ensure the preservation of evidence. The first letter was sent a week after the filing and service of the charge and the second was sent a mere three days after the filing of the second charge. Moreover, the sole basis of the second charge was one letter—the first evidence preservation letter—that came from the Union's own counsel. There was no need to send such a broad and threatening letter in response to the specific allegations of the second charge.

Indeed, if unions and employers are allowed to issue such overbroad and threatening evidence preservation letters merely in response to any ULP charge, individuals (who often act

pro se) will likely feel hounded into withdrawing charges, inherently chilling the NLRB's investigatory process. *See e.g., Tamosiunas,* 892 F.3d at 429. Objectively, any employee who received one of these letters after filing a charge would feel threatened and concerned they may be subject to sanction or discipline. *NLRB v. Scrivener*, 405 U.S. 117 (1972) (adopting a broad view of illegal conduct that threatens access to NLRB). Should the Board countenance this type of letter, it will become common for employers as well as unions to use overbroad and threatening evidence preservation letters to hound employees who are simply trying to assert rights under the Act. Employees, especially those acting *pro se*, receiving these types of letters will feel threatened and wonder if they are in over their head. They will feel pressured to withdraw their charges for fear of being unable to comply, or worried that they may be subject to some type of monetary sanctions if they make a mistake. Nor is there any need for these types of letters in Board practice (most especially at the charge stage). Charging parties are already required to turn over all relevant evidence to the Region investigating the charge. And if a respondent feels there is necessary evidence that the Region should consider when assessing the validity of a charge, it can ask the Region to request this information from the charging party as part of the investigation.

Moreover, a ULP charge simply sets in motion the ability of the General Counsel to investigate a claim and does not necessarily lead to adversarial litigation. For example, the Board has no independent power to act in any unfair labor practice case unless and until a third-party files an unfair labor practice charge to initiate the investigatory process. *NLRB v. Fant Milling Co.,* 360 U.S. 301, 307-09 (1959); *NLRB v. Indiana & Mich. Elec. Co.*, 318 U.S. 9, 17 (1943); *NLRB v. Hopwood Retinning,* 98 F.2d 97, 101-02 (2d Cir. 1938); *Kelley v. NLRB,* 79 F.3d 1238, 1245-46 (1st Cir. 1996); *NLRB v. National Licorice Co.,* 104 F.2d 655, 658 (2d Cir. 1939) ("a 'charge' is a condition precedent upon the Board's power to issue a complaint"), *aff'd as modified,* 309 U.S.

350, 368-69 (1940). Thus, there is simply no need or justification for sending threatening "evidence preservation letters" to an individual employee at the mere filing of a ULP charge. And to allow a respondent to send threatening letters to employees will only serve to hamper the Board's initial investigation if it causes a worried employee to withdraw the charge. Lobbing threatening "evidence preservation" letters at individual employees is not a known tactic in Board practice and it should not become one.

In response to the Charging Party's arguments, the ALJ found that the General Counsel's theory of the case was more limited than seeking a *per se* finding that evidence preservation letters are unlawful in response to a charge. (ALJD 12). But, even where the General Counsel has not clearly pursued a violation on a specific theory, the Board may find a violation if the underlying facts are not in dispute and support that theory of violation. *Local 58 IBEW*, 365 NLRB No. 30, slip op. at *5, n.17 (Feb. 10, 2017). "The Board, with court approval has repeatedly found violations for different reasons and on different theories from those of administrative law judges or the General Counsel, even in the absence of exceptions where the unlawful conduct was alleged in the complaint." *Id.* (citing *Hawaiian Dredging Construction Co.*, 362 NLRB 81, 82 n.6 (2015); *Pepsi America Inc.*, 339 NLRB 986 (2003); *Jefferson Electric Co.*, 274 NLRB 750 (1985); *NLRB v. WTVJ, Inc.*, 268 F.2d 346, 348 (5th Cir. 1959). Here, there is no dispute that the Union's counsel sent the letters, nor is there dispute about what the letters communicate. The General Counsel challenged the letters as unlawful, albeit under a narrower theory than Brown. The Board would be well within its power to declare all such evidence preservation letters to individual charging parties unlawful when they are in response to the mere filing of a ULP charge.

B. The evidence preservation letters are overbroad (Exceptions 2-6).

Even if not per se unlawful, there is little question that the letters sent to Brown are overbroad.

They are several pages long, demand Brown retain sources and information that have no plausible connection to the charge he filed, and appear to create a document production obligation that does not exist under Board procedures for charging parties during the investigatory stage. As one example, the letters demand that Brown search out all individuals who might possess relevant information and initiate a litigation hold on such evidence. This is overreaching and burdensome on a charging party, and more so on an individual employee who is simply asserting his *Beck* rights. Moreover, an individual charging party (who may be acting *pro se*) may not have the resources or expertise to instruct other parties to initiate litigation holds.

The ALJ conceded that "the letters are long and detailed and reference certain types of data sources . . . that would not likely contain evidence relevant to Brown's charges." (ALJD 10). Despite this concession, the ALJ still found the letters were clarified or narrowed after one parses other statements contained in the letter. *Id.* The ALJ found that the letter requests only "potentially relevant information must be preserved." *Id.* The problem with the ALJ's reasoning is an employee (likely pro se) would not know what "potentially relevant" information is. The letter requires Brown maintain any information that is relevant to the Union's asserted or potential defenses. (GC Ex. 13, 14). A charging party does not know a respondent's asserted or potential defenses because they are not communicated to a charging party until months later, in an answer to a complaint. In context, faced with such a letter, a reasonable charging party would drop his ULP charge or seek to preserve evidence far beyond what may be actually required.

The ALJ also claims employees would not understand these Union's letters are overbroad because they appear to be "form" letters. (ALJD 10, n.13). But this is a distinction without a difference, since being either a "form" letter *or* a newly crafted personal letter does not obviate the overbroad requests or make the employee feel more protected. Nor does the ALJ take into account

that a reasonable employee would likely be threatened by these requests, even if that is not the "only reasonable construction." *SEIU, Local 121RN*, 355 NLRB at 235 (2010). A reasonable employee would drop his charge or try to comply with these requests under threat of sanctions, especially when that request comes from a respondent's counsel. Indeed, sending such an overbroad letter makes it clear that the letter's purpose is to overwhelm or scare Brown into withdrawing the charge. Even if the Board allows some type of evidence preservation letter, it must require them to be much more focused and limited than this one.

C. The evidence preservation letters unlawfully threaten damages for non-compliance (Exceptions 7-11).

The letters contain statements the Union will not "hesitate to seek damages, sanctions, and other remedies under the law" for non-compliance. (GC Ex. 14). But, as the ALJ recognized, the Board has never imposed monetary sanctions against a party for spoliation, and "it is doubtful that the Board has the authority to do so." (ALJD 11) (*citing HTH Corp. v. NLRB,*. 823 F.3d 688 (D.C. Cir. 2016) and *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1089 (D.C. Cir. 2016) (Board cannot require respondent to pay litigation expenses in ULP proceedings)). Instead, the ALJ found monetary sanctions could be imposed for spoilation against a charging party in a federal court subpoena enforcement action. This finding is illusory and fanciful and does not support the letters sent here.

First, the threat of sanctions in a federal court subpoena enforcement is too attenuated to serve as the basis for the threats contained in the evidence preservation letters in this case. The Board can take note of its own statistics to show how unlikely it is that the General Counsel initiates a subpoena enforcement procedure against an individual employee-charging party on behalf of a private party, let alone the possibility that a employee charging party is then financially sanctioned for evidence spoilation by the federal court. Moreover, the evidence preservation letter at issue

here does not make this distinction clear. A reasonable employee would read the Union's letter and would likely believe he or she could be subject to sanctions *by the NLRB* for non-compliance.

Moreover, whether or not sanctions are theoretically available in some remote or unlikely forum is well beside the point. Section 8 proscribes "any action by an employer or union that 'has a reasonable tendency' to coerce or restrain employees in the exercise of their Section 7 rights." *Tamosiunas*, 892 F.3d at 429. The point is the Union is threatening Brown with the potential for monetary damages (which the ALJ concludes could include litigation costs) simply for filing a charge under the Act.[3] But the only conceivable purpose of such a threat is to intimidate Brown into withdrawing the charge. Indeed, any interest the Union has in threatening monetary damages is far outweighed by Brown's greater interest in vindicating his Section 7 rights by filing a charge.

By analogy, the Board has found discovery requests in other forums can violate the Act. For example, in *Guess?, Inc.*, 339 NLRB 432, 434-35 (2017), the Board found civil deposition questions about union activities were unlawful because: (1) they were not relevant; (2) had an illegal objective; and (3) the interest in obtaining the information did not outweigh the employees' Section 7 rights. The Union's evidence preservation letters similarly fail this standard. First, the Union's letters were not relevant to the litigation because the letters demand Brown preserve evidence that has no possible relation to the simple *Beck* issues that were asserted in his ULP

[3] The ALJ claims the Union's threat does not implicate Section 7 because its threatening damages for evidence spoilation. (ALJD 12). But, the threats were made in direct response to the filing of a charge and the test is "whether the words *could* reasonably be construed as coercive" even if that is not the "only reasonable construction." *Pomona Valley Hosp.*, 355 NLRB at 235 (emphasis added). Under this standard, if any reasonable employee could view the communication as coercive or restraining the union has violated the law. And a reasonable employee could view this as coercive given the union sent the letter twice in direct response to two charges. If a reasonable employee could interpret the letter as a threat to pursue damages against the employee for exercising their rights under the Act, this makes the case similar those where the Board has held similar threats to sue unlawful. *See DHL Express, Inc.*, 355 NLRB 680 (2010); *see also Wolverine World Wide, Inc.*, 243 NLRB 425, 432 (1979); *Paymaster Corp.*, 165 NLRB 381 (1967).

charge. Even to the extent that any documents are relevant, they are unnecessary because this case concerns *the Union's demand letters* and *its* non-response to a *Beck* request—the Union should have in its possession all the documents it needs.

Second, the evidence preservation letters at issue here have a coercive and therefore illegal objective—to intimidate Brown with its wide-ranging and irrelevant requests and threats of sanctions and/or damages. If the Union was truly interested in having Brown maintain documents, it might have sent a much narrower and non-threatening request to preserve any documents referenced in the ULP charge, without attaching heavy-handed threats of sanctions.

Third, the right to file a charge and exercise Section 7 rights far outweighs the Union's alleged "need" to have evidence preserved. As stated above, the letter is wholly unnecessary because Brown was already under an obligation to provide all of his evidence to the Region, which acts as a gatekeeper to investigate and determine whether charges are meritorious. The charge merely triggers an investigation by the General Counsel, nothing more. If the Union believed there were exculpatory documents in Brown's possession that were relevant to an actual defense, it was free to inform the Region which could have requested that additional material as part of its investigation. Finally, the Union was free to issue a subpoena under the Board's rules once the General Counsel issued a complaint (something it also declined to do in this case). However, the Union had no grounds to issue threatening letters to Brown for merely filing a ULP charge.

CONCLUSION

For the foregoing reasons, the Union violated the Act and the Board should grant Brown's exceptions to the ALJ's decision, and find the Union violated the Act in all respects.

Date: December 31, 2020

Respectfully submitted,

/s/ Aaron B. Solem
Aaron B. Solem
Glenn M. Taubman
c/o National Right to Work Legal
Defense Foundation, Inc.
8001 Braddock Road, Suite 600
Springfield, VA 22160
703-321-8510
abs@nrtw.org

Counsel for Charging Party

CERTIFICATE OF SERVICE

I hereby certify that December 31, 2020, a true and correct copy of Charging Party's Brief in Support of Exceptions was filed electronically using the NLRB e-filing system, and copies were sent to the following parties via e-mail:

Sarah Ingebritsen
NLRB, Subregion 36
Green-Wyatt Federal Bldg.
1220 SW 3rd Ave., Ste. 605
Portland, OR 97204
Sarah.Ingebritsen@nlrb.gov
Counsel for the General Counsel

Anne I. Yen,
David A. Rosenfeld,
Weinberg Roger & Rosenfeld
1001 Marina Village Pkwy.,
Ste. 200 Alameda, CA 94501-6430
ayen@unioncounsel.net
drosenfeld@unioncounsel.net

/s/ Aaron B. Solem
Aaron B. Solem